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cause of action. *Travis v. Rochester Bridge Co.* (1918, Ind. App.) 118 N. E. 694.

This case calls attention to the gradual passing of the old rule that a contractor is not liable to indeterminate third parties for injuries caused by defective construction because there is no privity of contract between them. See *Winterbottom v. Wright* (1842, Exch.) 10 M. & W. 109. The first departure from the old rule was made in the case of articles inherently dangerous to life or health. *Thomas v. Winchester* (1852) 6 N. Y. 397 (poison wrongly labelled). The character of the article imposed upon the maker a positive duty of care—a tort duty—not to deal with it so as to cause harm to any person who might reasonably be expected to use it; the lack of privity of contract could be no defense to a violation of this duty. *Waters-Pierce Oil Co. v. Deselms* (1908) 212 U. S. 159, 29 Sup. Ct. 270. Some courts extend the duty of care to include cases where the instrumentality was not dangerous in itself but was made so by defective construction. *Huset v. Case Threshing Machine Co.* (1903, C. C. A. 8th) 120 Fed. 865; *MacPherson v. Buick Co.* (1916) 217 N. Y. 382, 111 N. E. 1050; see also (1916) 25 YALE LAW JOURNAL, 679. But many courts have refused to go so far. Some hark back to the old and pointless objection of lack of privity, as though the sole liability were in contract for breach of implied warranty, and not equally in tort. See *Cadillac Co. v. Johnson* (1915, C. C. A. 2d) 221 Fed. 801. Other courts have argued that the doctrine would create a liability so indefinite as to expose industry to ruin through litigation. *Curtin v. Somerset* (1891) 140 Pa. 70, 21 Atl. 244. Indefiniteness, if an objection, would apply to any tort duty; the conclusion drawn from it seems to represent a mistaken view of fact and policy—it presupposes a prevalence of negligence which, if it exists, can best be remedied by making such negligence expensive. On the relation of the doctrine here discussed with that of liability for breach of warranty by a vendor, see p. 961, *supra*. As in the principal case, bridge contractors have been held liable for injuries caused to the traveling public by negligent construction, but the cases have always, so far as discovered, laid emphasis upon the fact that the defects in construction were known to the defendant and were concealed from the other contracting party as well as from the public. *O'Brien v. American Bridge Co.* (1910) 110 Minn. 364, 125 N. W. 1012. Whether there would be liability if the contractor had faithfully performed his contract and the injury were due merely to a defect in the plans which the contractor ought to have recognized as creating a structure dangerous to the public is a question which the principal case suggests but does not decide. Nor does it at all discuss the question of the defendant's knowledge of the defect: the case came up on demurrer to a complaint in which actual knowledge was alleged. Such actual knowledge is held in one group of cases essential to the defendant's liability. *Schubert v. Clark* (1892) 49 Minn. 331, 51 N. W. 1103; *Earl v. Lubbock* [1905] 1 K. B. 253. A second group holds "imputed" knowledge to be sufficient, but only when the circumstances are such as to warrant a jury in finding that the defendant *must have known* of the defect. *O'Brien v. American Bridge Co.*, *supra*. Courts which follow this theory deny the defendant's liability where he only "should have known" or "ought to have known." *Wood v. Sloan* (1915) 20 N. M. 127, 148 P. 507. A third group holds that if the defendant *should have known*, he cannot escape because he did not know. *MacPherson v. Buick Co.*, *supra*. The last rule, applying a purely objective test, seems to be more in accord with the general principles of tort liability.

TRADE-MARKS—APPLICATION TO DIFFERENT GOODS OF SAME CLASS.—The plaintiff was the registered owner of the trade-mark "Old Crow" which it had always applied to its straight rye and bourbon whiskey. It sought an injunction against the defendant's use of the same trade-mark on the defendant's straight

whiskeys. The defendant pleaded a prior adjudication to the effect that the defendant had first appropriated the trade-mark "Old Crow" to designate its *blended* whiskey, although by *laches* it had lost its exclusive rights in this name as against the plaintiff. *Held*, that by virtue of prior appropriation of the trade-mark for blended whiskey the defendant was privileged to use it also for straight whiskey. *Rock Spring Distilling Co. v. Gaines & Co.* (1918, U. S.) 38 Sup. Ct. 327.

The gist of the wrong of unfair competition in trade-mark cases is the probability that the public may be led to mistake the defendant's goods for those of the plaintiff. *Amoskeag Mfg. Co. v. Garner* (1876, N. Y. Sup. Ct.) 54 How. Prac. 297. The test applied by the courts to determine such probability is free of fine distinctions; it is the care exercised by the average buyer of that particular class of goods. *Bass, Ratchiff & Gretton v. Feigenspan* (1899, C. C. D. N. J.) 96 Fed. 206. *Rushmore v. Badger Brass Mfg. Co.* (1912, C. C. A. 2d) 198 Fed. 379. It follows that the right to the exclusive use of a given trade-mark may be restricted to its use on a particular class of goods, and the use of the same mark by another permitted in connection with a different class. *Virginia Baking Co. v. Southern Biscuit Works* (1910) 111 Va. 227, 68 S. E. 261 (soda crackers and ginger snaps; the propriety of putting them in separate classes may, however, be doubted). But within its own class the trade-mark will be protected by injunction. As the court says, great confusion would arise in business from recognizing the same trade-mark as belonging to different persons for different kinds of the same article. Authorities in the lower courts accord: *American Tobacco Co. v. Polacsek* (1909, C. C. S. D. N. Y.) 170 Fed. 117 (smoking tobacco and cigarettes); *Collins Co. v. Oliver Ames Corp.* (1882, C. S. D. N. Y.) 18 Fed. 561; (axes, etc., and spades) *G. G. White Co. v. Miller* (1892, C. C. D. Mass.) 50 Fed. 277 (straight and blended whiskey); *Layton Pure Food Co. v. Church & Dwight Co.* (1910, C. C. A. 8th) 182 Fed. 35 (baking powder and baking soda). See also (1911) 30 L. R. A. (N. S.) 167. It is, however, possible as in the principal case that a prior appropriator may by *laches* lose his exclusive right against all competitors and as far as the other party to the suit is concerned, have merely a privilege or as the case calls it, a "defensive right" to use the mark. The cases on the main point of the instant case, though not numerous, are in agreement.

TRADING WITH THE ENEMY—CONTRACTS CONFERRING PECUNIARY ADVANTAGE ON CITIZEN.—In August, 1915, the defendants, D & Co., a French firm, sold to the plaintiff, Y, a subject of Bulgaria resident in Marseilles, a quantity of wheat to arrive. By the French law of September 27, 1914, the performance of any contract between a German or Austrian and a Frenchman, operating to the advantage of the German or Austrian, was declared null and void, which provision of law was extended to subjects of Bulgaria by decree of November 7, 1915. When the wheat arrived this decree was in force, on which ground the defendants refused to make delivery to the plaintiff. The plaintiff had in the meantime resold much of the wheat to French individuals at a loss. Examination of the terms of the contract and of the interests of the various parties under it showed that it operated to the decided advantage of Frenchmen and to the disadvantage of the plaintiff. *Held*, that the defendants should be ordered to make delivery to the plaintiff. *Yulzari v. Dreyfus*, Tribunal de Commerce of Marseilles, Nov. 16, 1915, reported in (1917) 44 CLUNET, 1015.

The case illustrates two striking differences between the French and the Anglo-American law. (1) The plaintiff, although resident in France, was regarded as an alien enemy, the test of nationality determining enemy character for trading purposes. The Anglo-American test of domicile would have relieved the plaintiff from this status. His permission to sue in France is attributable